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Case No. 83-1362^③

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES LOUDERMILL

Cross-Petitioner

-vs-

THE CLEVELAND BOARD OF EDUCATION, et al.

Cross-Respondents

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION
OF CROSS-RESPONDENT
CLEVELAND CIVIL SERVICE COMMISSION

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THE CLEVELAND BOARD OF EDUCATION, et al.

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BRIEF OF CROSS-RESPONDENT CLEVELAND CIVIL SERVICE
COMMISSION IN OPPOSITION TO CROSS-PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED

1. Whether the Court below correctly held that a period of of less than nine months in which to hear and consider the appeal of a discharged employee is not so excessive as to constitute a denial of due process of law?
2. Whether a question as to alleged dissemination of references concerning an employee's honesty may be considered by this

Court when such question has not been raised before the Court of Appeals below? .

FACTS

The relevant facts herein are uncontroverted. However, in describing the time during which his appeal was pending before the Cleveland Civil Service Commission, cross-petitioner consistently refers to the so-called nine-month "delay" before his appeal was "completed". This characterization unnecessarily confuses the issues before the Court, and accordingly, a chronological review of the relevant events may be helpful.

(1) November 12, 1980, Cross-petitioner's Notice of Appeal to the Civil Service Commission was filed. (Opinion of Manos, J., Appendix of Petitioner at A52.

(2) January 22, 1981, a hearing was scheduled before a referee appointed by the Com-

mission pursuant to Ohio Rev. Code Sec, 124.34, but was continued. (Id.)

(3) January 29, 1981, a hearing was held before the referee. (Id.)

(4) April 1, 1981, the referee filed his Report and Recommendation with the Civil Service Commission (Id.), in which he recommended that cross-petitioner be reinstated. The appointing authority, petitioner herein, objected to that Report and Recommendation, and accordingly, an appeal was perfected to the full Civil Service Commission. (Cross-petition, at 2).

(5) July 20, 1981, a hearing was held before the full Civil Service Commission, which then orally announced that it would affirm the dismissal of cross-petitioner. (Opinion of Manos, J., Appendix of Petitioner, at A52).

(6) August 10, 1981, the Civil Service Commission approved the findings of fact and conclusions of law affirming the discharge of

the findings of fact and conclusions of law affirming the discharge of cross-petitioner. (Id.)

(7) August 21, 1981, cross-appellant's attorneys were notified of the Commission's action by ordinary mail. The record discloses no appeal therefrom. (Id.)

Cross-petitioner considers the total period from the date his Notice of Appeal was filed (November 12, 1980) until the date of notification of the Commission's action (August 21, 1981), then complains that the cross-respondent, the Cleveland Civil Service Commission, deprived him of due process by interposing a nine-month "delay" before his appeal was "completed". It is submitted that the facts clearly establish otherwise.

Analyzing the several stages of the cross-petitioner's appeal to the Civil Service Commission, it is evident that the Commission considered that appeal and appointed a referee to hear it, and that

the hearing was held and a Report and Recommendation issued, all within twenty weeks of the filing of the Notice of Appeal. The balance of the so-called "delay" was occasioned by the subsequent objections to the Report and Recommendation filed by the appointing authority, the Petitioner herein. Furthermore, the record discloses that the decision of the Commission, to affirm the discharge of cross-petitioner, was made and announced at its meeting July 20, 1981, one month before the date referred to by cross-petitioner. The additional month was needed to comply with formal requirements as to preparation and adoption of findings of fact and conclusions of law and a vote approving the minutes thereof.^{1/}

^{1/}
In fact, with administrative appeals available under Ohio law (Rev. Code Sec. 124.34), the appeal was not "completed" even then, but could have continued through Ohio courts for years thereafter.

REASONS FOR DENYING THE WRIT

I

The Courts Below Properly Found That A Period Of Less Than Nine Months Is Not An Excessive Time In Which To Hear, Consider, And Rule Upon An Administrative Appeal From Termination From Public Employment.

The case law submitted by cross-petitioner utterly fails to provide any support for his contention that the nine months between the filing of his Notice of Appeal and the decision of the Civil Service Commission affirming his discharge constituted a denial of a prompt post-termination remedy and thus, a denial of due process of law.

While it is conceded that a person may have a property right in his continued employment, and that even an inadvertent denial of due process may be actionable, cross-petitioner has provided no argument and no precedent to support his contention that the time during which his appeal was before the Civil Service Commission constituted such a denial. Those cases which he has cited,

without exception, either are distinguishable on their facts or actually contradict cross-petitioner's own arguments.

Arnett v. Kennedy, 416 U.S. 134 (1975), like the present case, concerns a post-termination hearing for a discharged employee. The Court held that a period of three months to affirm that discharge was not excessive.

Fusari v. Steinberg, 419 U.S. 379 (1975) concerned a hearing as to termination of unemployment benefits. Mathews v. Eldridge, 424 U.S. 319 (1976) involved a hearing as to termination of Social Security Disability benefits. ^{2/} Goldberg

^{2/}
Cross-petitioner concedes that this Court held in Mathew, supra, that: "... a ten to eleven month delay in affording post termination hearings was not excessive." Cross-petition, at 3. Actually, as the Court stated in Mathew, supra, at 342, "Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after hearing exceeds one year." Emphasis added.

v. Kelly, 397 U.S. 254 (1970) arose from a termination of welfare benefits. In all three cases, the Court noted the draconian effect of the loss of benefits upon the recipient. As the Court commented in Goldberg, supra, at 264:

(T)he crucial factor in this context--a factor not present in the case of ... the discharged government employee ... -- is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.

This language was cited with approval in Arnett vs. Kennedy, supra, concurring opinion of Powell, J., at 169, in which he observed that a discharged public employee, unlike a terminated welfare recipient, may have independent resources to see him through the period of his appeal, may be able to secure alternative private-sector employment, and as a last resort may be eligible for welfare benefits. Thus, this Court has made it clear consistently that the

need for a prompt disposition of an appeal is substantially greater in cases involving termination of government benefits than in those involving termination of government employment--contrary to the argument proposed by cross-petitioner. If one year or more is not an excessive period for consideration of an appeal of termination of disability benefits, certainly less than nine months is not an impermissibly long period for a multi-stage appeal process as to discharge from public employment.

Petitioner notes, at 14, that this Court recently granted certiorari, "... to consider the constitutionality of similar pre-termination and post-termination procedures for Florida Civil Service employees." Scherer v. Davis, 523 F.Supp. 4 (N.D. Florida 1981), affirmed without opinion, 710 F.2d 838 (11th Cir. 1983), cert. granted sub nom. Davis v. Scherer, Case No. 83-490, 52 U.S.L.W. 3449 (December 12, 1983).

Cross-petitioner also cites Scherer, but in support of his request that this Court "...take judicial notice that the issue of the unconstitutional delay in the disposition of post-termination appeals was accepted for review. ..." Cross-respondent submits that this is an inaccurate and misleading characterization of Scherer. In that case, the District Court had before it Sec. 110.061, Florida Statutes (1977), together with its implementing rules, which it found to be unconstitutional:

...insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee deemed

to have been dismissed
without just cause.^{3/}

With respect to the post-termination procedures at issue here, there has been no suggestion that the Ohio statute, Rev. Code Sec. 124.34, fails to provide a prompt post-termination hearing. To the contrary, the substance of the cross-petition is the assertion, at 3, that cross-petitioner's appeal "... was not completed until nine (9) months after his notice of appeal was filed." Emphasis added. Furthermore, cross-petitioner concedes that this length of time exceeded the time in which Ohio Rev. Code Sec. 124.34 directs that such appeal be heard.

^{3/}
Unlike the Florida statute before the Court in Scherer, supra, cross-respondent notes that under Ohio law an employee who has been wrongfully discharged is entitled to reinstatement with all back pay' and benefits restored. State, ex rel. Colangelo v. McFaul, 62 Ohio St. 2d 200 (1980); State, ex rel. Hamlin v. Collins, 65 Ohio St. 63 (1981); State, ex rel. Kabatek v. Stackhouse, 66 Ohio St. 2d 64 (1981).

Gibson v. Berryhill, 411 U.S. 564, 575, n.14 (1973), cited by cross-petitioner as supporting his contention that "Administrative proceedings have been held to be unconstitutional because of excessive delays," in fact holds only that excessive delays by an administrative agency may make such remedies inadequate so as to obviate the exhaustion requirement. He cites that case further, supra, at 577, for the proposition that he "... had a right to have his appeal timely decided by the Commission." That citation, however, merely holds that abstention pursuant to Younger v. Harris, 401 U.S. 37 (1971):

... contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.

Cross-petitioner's reliance upon Barry v. Barchi, 443 U.S. 55 (1979), is similarly misplaced, in that that case dealt with the suspension of a horse trainer by the New York State Racing and Wagering Board, in which by statute the trainer had no means by which to challenge his suspension until the disciplinary action had become final. By contrast, however, and as noted by the Court of Appeals herein (Appendix of Petitioner, at A29), Ohio Rev. Code Sec. 124.34 provides a mechanism for prompt review. If the period required for such review exceeded the time provided by statute, cross-petitioner clearly had a right to petition in mandamus or procedendo in order to expedite that process.

Cross-petitioner argues that the availability of mandamus "... does not alleviate the government's responsibility of providing individuals with basic due process requirements where deprivation of life, liberty or property are in-

involved," citing Mennonite Board of Missions v. Adams, _____ U.S. _____, 103 S.Ct. 2706, 2712 (1983). Clearly, on its facts that case is totally inapposite here. The constitutional obligation there was the duty to provide notice to a creditor of an impending tax sale; the Court held that neither notice by publication and posting nor mailed notice to the property owner is sufficient to give the mortgagee actual notice, where the owner is not in privity with his creditor and has failed to take steps necessary to protect his own interests. Here, to the contrary, cross-petitioner was aware throughout the proceedings of his status and of what remedies were available to him. He may not simply rest upon his rights and allow time to pass, then complain that the passage of time violated those rights.

II

The Question Of Alleged Dissemination Was Not Raised Before The Court Of Appeals And Is Not Supported By The Record Before This Court And Thus Should Not Be Considered Here.

Cross-respondent, Cleveland Civil Service Commission, submits that the second question proposed for review in the cross-petition is not properly before this Court, in that it is not set forth in the record below and thus, is not subject to review.

Furthermore, the record below does disclose that, ultimately, cross-petitioner was terminated on the basis of the charges brought against him, and fails to show any appeal therefrom. Accordingly, and cross-petitioner's protestions to the contrary notwithstanding, any references to his honesty which may have been made were both proven and justified by a judgment which was not appealed, and which this is now final.

Finally, there is nothing in the cross-petition alleging that any such references were disseminated by the cross-respondent Cleveland Civil Service Commission. Cross-petitioner has not given any basis for any claimed liability for such alleged references, and it is submitted that none exists.

CONCLUSION

The cross-petition for writ of
certiorari should be denied.

Respectfully submitted,

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